COPY

IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34162

THE BOOK EXCHANGE, INC.,
a West Virginia Corporation,

Appellant,

vs.

MONONGALIA COUNTY CIRCUIT COURT
CIVIL ACTION NO.: 07-C-369

WEST VIRGINIA UNIVERSITY, through the
WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS, a corporation;
NARVEL G. WEESE, JR., individually; and
BARNES & NOBLE COLLEGE BOOKSELLERS, INC., d/b/a
WEST VIRGINIA UNIVERSITY/DOWNTOWN BOOKSTORE,
WEST VIRGINIA UNIVERSITY/EVANSDALE BOOKSTORE,
WEST VIRGINIA UNIVERSITY/LAW BOOKSTORE, and
WEST VIRGINIA UNIVERSITY/HEALTH SCIENCES BOOKSTORE,

Appellees.

APPELLANT'S BRIEF

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KIND OF PROCEEDING and NATURE OF THE RULING BELOW

The appellant herein and plaintiff below, the Book Exchange, Inc., (hereinafter referred to as the "Book Exchange"), appeals the final order of the Monongalia County Circuit Court, entered December 7, 2007, which dismissed with prejudice the Book Exchange's claims of tortious interference with business relations, inter alia, against appellees herein and defendants below, West Virginia University, et al., (hereinafter "WVU") and Barnes & Noble College Booksellers, Inc., (hereinafter "Barnes & Noble"). The court, Division I, also dissolved a preliminary injunction, which had been granted by Division II. (R. at 122 and Tr., July 20, 2007, R. at Vol. III). The injunction required appellees to cease their withholding of textbook monies from financial aid students, for the Fall 2007 academic term.

The Book Exchange's verified complaint and application for injunction consisted of 110 paragraphs over 18 pages. (R. at 1). This pleading was brought on June 8, 2007, and sought damages in the amount of $2 million in past expected revenues and for future losses, all related to the automatic and involuntary withholding of portions of student financial aid awards by Barnes & Noble and WVU. (R. at 1, 16). Appellant served discovery requests on the appellees as part of the service of the complaint in mid-June 2007. (R. at 20 and 28).

Motions to dismiss per Rule 12(b)(6) were filed by WVU on July 12, 2007, and by Barnes & Noble on August 6, 2007, and the Book Exchange filed a 27 page response. (R. at 174). The appellees' motions were argued at a hearing held before the Honorable Judge Robert B. Stone on August 28, 2007. (Tr., August 28, 2007, R. at Vol. IV).

The appellees began to answer appellant's discovery requests at the end of September 2007. (R. at 214 and 216). Mere days after this initial discovery production, the circuit court dismissed appellant's complaint in its entirety, by opinion letter dated October 3, 2007. (R. at 301). The opinion letter did not state whether the dismissal was with or without prejudice. After the parties were unable to reach agreement regarding the proposed order granting dismissal, on November 14, 2007, the Book Exchange filed its objections to the proposed order, together with motions in the alternative to permit discovery to proceed, to amend the complaint, and to enforce a settlement agreement. (R. at 221). The circuit court's December 7, 2007, final order also denied each of the alternative motions.

No answers to the complaint were ever served or filed by Barnes & Noble or WVU. No pretrial or scheduling conference was ever set by the circuit court. The discovery process – which appellees had begun in earnest by late September 2007 – was halted by virtue of the court's October 4, 2007, opinion letter. Although the December 7, 2007, order was final, WVU and Barnes & Noble currently collectively seek $793,521.17 from the Book Exchange as payment for claimed losses and attorneys' fees and costs.[1]

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[1]On March 4, 2008, the Book Exchange served its original designation of record for appeal. On March 10, 2008, Barnes & Noble filed a Motion for Execution on a Bond (R. at 320) and a memorandum in support thereof (R. at 323) requesting the Book Exchange to pay $321,754.00 in lost profits for Barnes & Noble, $154,904.10 for WVU's lost sales, and $259,869.07 for attorneys' fees and costs, as a result of the injunction granted on July 25, 2007. (R. at 122 and Tr., July 20, 2007, R. at Vol. III). After the Supreme Court received the original record on April 11, 2008, WVU filed its own Motion for Execution upon the Bond, seeking $56,994.00 in attorney's fees and $154,904.10, in claimed losses. (R. at 347). Without permitting a double recovery to appellees for WVU's claimed losses, these figures total $793,521.17.

STATEMENT OF THE FACTS

The Book Exchange primarily sells textbooks and education supplies to WVU students in Morgantown, at two physical locations, which are on Willey Street and Patteson Drive. The Book Exchange has been selling textbooks to WVU students since 1934 and has been incorporated with the West Virginia Secretary of State since 1947. The Book Exchange's focus is and has been on the sale of lower cost used books to WVU's neediest students, those on financial aid.

On April 2, 2001, WVU contracted with Barnes & Noble for the purposes of leasing WVU's bookstores in Morgantown and elsewhere. (R. at 2). W. Va. Code § 18B-10-14 authorizes institutions of higher education to sell textbooks to students, and subsection (j) makes the statute applicable to Barnes & Noble as a "private contractor." Under the contract, Barnes & Noble became an on campus vendor at WVU for the sale of student textbooks and other items. (R. at 2). The initial lease term was from May 1, 2001, through April 30, 2006. (R. at 3). On January 1, 2006, WVU and Barnes & Noble renewed the lease for a second five year term, and the contract now begins May 1, 2006, and ends April 30, 2011. (R. at 3).

The contract between Barnes & Noble and WVU contains a provision at ¶ 3.15 that Barnes & Noble is designated as an agent of WVU "to process all debit card and financial aid transactions for the bookstores." (R. at 3). The original lease, for the first five year term, at ¶ 3.15, stated that WVU "will work with [Barnes & Noble] to facilitate a direct interface, through [Barnes & Noble's] point of sale system, to student financial aid accounts." (R. at 3). The current lease, for the second five year term, amends ¶ 3.15

to read that WVU "shall provide a direct interface to student financial aid accounts via . . . transfer to [Barnes & Noble's] point-of-sale system." (R. at 3). On August 15, 2005, Barnes & Noble and WVU implemented the use of the "direct interface . . . to student financial aid accounts," (as contemplated in ¶ 3.15 of the first five year term of the lease agreement). (R. at 3).

Appellees utilize the interface by accessing WVU financial aid student accounts electronically, for the purposes of withholding as much as $500.00 of a student's aid award. (R. at 3-4). The appellees forward confusing electronic correspondence to the financial aid students to notify the students that an account has automatically been created, and that the textbook money has been reserved or held for use at appellees' bookstores. (R. at 6, 8, 9, 11, 12). These e-mails come at particularly busy times, with arbitrary deadlines.[2] "WVU students either are led to believe that they are required to purchase their textbooks from [appellees] or are otherwise forced to do so due to the lack of available textbook money to be spent at The Book Exchange," if the students fail to meet appellees' deadlines "to be removed from the automatic program." (R. at 11, 12). Appellees constructively took these monies from financial aid students, without student consent, under the guise that the taking was for the student's "convenience." (R. at 4-6). The held textbook monies are electronically placed for sole use at the Barnes & Noble WVU campus bookstores. (R. at 3-6).

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[2]For example, a December 13, 2005, WVU e-mail advised students that the "account at the bookstore will be created automatically," and the student was given a deadline of midnight, December 16, 2005, to take action not to participate. December 9, 2005, was the last day of classes (for the Fall 2005 academic semester), and final exams began December 13, 2005. Complaint ¶¶ 18-32, 50, 63-74, and 83.

Prior to the beginning of the withholding or freezing of student financial aid monies in August 2005, neither Barnes & Noble nor WVU obtained any approval, authorization, or consent from the WVU students who receive financial aid. (R. at 4). In order to spend the frozen textbook monies, the financial aid student must buy his or her textbooks at the Barnes & Noble store. The student may receive a "refund" of the held textbook monies from WVU. (R. at 5-6). The parties agree that any refund occurs approximately two weeks after the semester starts; yet textbooks are naturally needed at the beginning of the semester. This automatic reserve of monies serves to trap students by default, due to its opt-out nature. (R. at 5-6). Students (who are trapped in the automatic reserve) are precluded from using these monies to make purchases at the Book Exchange. (R. at 5-6). The Book Exchange has suffered significant losses as a direct result of appellees' involuntary taking of student aid through electronic interface. (R. at 5-6, 19). The Book Exchange has no access to WVU financial aid student accounts.

The lease rent originally required Barnes & Noble to pay WVU $1.55 million annually, in addition to 13% of all of Barnes & Noble's gross sales over $15 million. (R. at 6). Modifications were made at the time the appellees' contract was extended for the second five year term, which included a change to the percentage WVU receives from the gross sales received by Barnes & Noble. (R. at 6 and 7). WVU's take was increased after the student financial aid interface was put into place. (R. at 7).

WVU now receives the following percentages of gross sales: 11.5% of all sales between $13.5 million and $14.5 million; 12% of all sales between $14.5 million and $15

million; and 13% of all sales over $15 million. (R. at 7). Another modification states that if WVU now ends the reserve account program, Barnes & Noble has the right to renegotiate these payments and percentages with WVU. (R. at 7).

In December 2006, WVU marked its fifth consecutive year of record enrollment at the Morgantown campus. (R. at 7). In 2000, student enrollment at WVU was near 22,000. (R. at 7). In 2006, for the first time, enrollment topped 27,000. (R. at 7). WVU estimated that in Spring 2007, it had approximately 8,800 financial aid students, who spent approximately $500 each semester on books. As such, the annual textbook sales (not including summer sessions) to financial aid students alone is approximately $8.8 million.

The complaint against the appellees contains counts for tortious interference with business relations and civil conspiracy, and claims for statutory violations as follows: W. Va. Code § 18B-10-14(c) (which requires appellees to ensure that its bookstores "minimize the costs to students of purchasing textbooks"); W. Va. Code § 47-18-3(a), the West Virginia Antitrust Act (stating that every "contract . . . or conspiracy in restraint of trade or commerce in this State shall be unlawful"); W. Va. Code § 47-18-3(b)(1)(B) (defining an unlawful and unreasonable restraint of trade as a contract or conspiracy between two or more persons which controls the sale or supply of any commodity for the purpose or with the effect of controlling or maintaining the market price of the commodity); W. Va. Code § 47-18-3(b)(1)(C) (defining an unlawful and unreasonable restraint of trade as a contract or conspiracy between two or more persons which allocates or divides customers for any commodity); W. Va. Code § 47-18-4 (stating that

the "establishment, maintenance or use of a monopoly or an attempt to establish a monopoly of trade or commerce, any part of which is within this State, by any persons for the purpose of excluding competition or controlling, fixing or maintaining prices is unlawful"); W. Va. Code § 46A-6G-2, the West Virginia Electronic Mail Protection Act (prohibiting misleading information in e-mails); W. Va. Code § 46A-6 et seq., the West Virginia Consumer Credit and Protection Act (providing for the protection of the public from deceptive and fraudulent acts or practices and to foster fair and honest competition); W. Va. Code § 46A-6-102(7) (defining unfair methods of competition and unfair or deceptive acts or practices); W. Va. Code § 47-11A-3, the West Virginia Unfair Trade Practices Act; W. Va. Code § 47-11A-4 (providing for personal responsibility for individual violations of the Unfair Trade Practices Act, which is the reason for the inclusion of WVU Vice President for Administration and Finance, Narvel G. Weese, Jr., as an individual defendant); and W. Va. Code § 46-1-304, the Uniform Commercial Code (requiring that every contract contain an obligation of good faith in performance and enforcement).

ASSIGNMENTS OF ERROR and DECISION OF LOWER TRIBUNAL

The Book Exchange asserts the circuit court erred by:

(1) dismissing the complaint per W. Va. R. Civ. P. 12(b)(6);

(2) dismissing the complaint with prejudice;

(3) considering "evidence and proffers" under Rule 12(b)(6); applying a W. Va. R. Civ. P. 56 summary judgment legal standard; and dismissing the complaint without permitting discovery;

(4) dismissing the complaint without permitting the Book Exchange to amend its complaint; and

(5) dissolving the preliminary injunction entered July 25, 2007.

POINTS AND AUTHORITIES and DISCUSSION OF LAW

(1) The Book Exchange's complaint should not have been dismissed, per W. Va. R. Civ. P. 12(b)(6).

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syl. pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). On appeal, Rule 12(b)(6) motions to dismiss are reviewed de novo. Longwell v. Board of Educ. of the County of Marshall, 213 W.Va. 486, 488, 583 S.E.2d 109, 111 (2003). W. Va. R. Civ. P. 12(b)(6) provides a defense for "failure to state a claim upon which relief can be granted."

The purpose of a Rule 12(b)(6) motion is "to test the formal sufficiency of the complaint." Fass v. Nowsco Well Service, Ltd., 177 W.Va. 50, 51, 350 S.E.2d 562, 563 (1986) and John W. Lodge Distributing Co. v. Texaco, Inc., 161 W. Va. 603, 604-05, 245 S.E.2d 157, 158 (1978). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. pt. 3, Chapman v. Kane Transfer Co., 160 W. Va. 530, 236 S.E.2d 207 (1977)(citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)(overruled in Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)) (Twombly's overruling of Chapman not recognized in Highmark West Virginia, Inc. v. Jamie, 221 W. Va. 487, 655 S.E.2d 509, n. 4 (2007)). "For the purposes of the motion to dismiss, the complaint is to be construed in the light most favorable to [the] plaintiff." Chapman, 160 W. Va. at 528, 236 S.E.2d at 212.

"[A]ll that the pleader is required to do is to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist." State ex rel. Arrow Concrete Co. v. Hill, 194 W.Va. 239, 245, 460 S.E.2d 54, 61, n.6 (1995)(citing Lodge, 161 W. Va. at 605, 245 S.E.2d at 159 (1978)). These inferences must reasonably be drawn "in favor of the plaintiff." Conrad v. ARA Szabo, 198 W.Va. 362, 369, 480 S.E.2d 801, 808 (1996). Allegations contained in a complaint are to be viewed liberally in favor of the plaintiff. Bowers v. Wurzburg, 205 W.Va. 450, 462, 519 S.E.2d 148, 160 (1999) and Lodge, 161 W. Va. at 605, 245 S.E.2d at 158. The "complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist." Fass, 177 W.Va. at 52, 350 S.E.2d at 564 (1986). "[A] defendant may not succeed on Rule 12(b)(6) motion if there are allegations in the pleadings which, if proved, will provide a basis for recovery." Kopelman and Associates, L.C. v. Collins, 196 W. Va. 489, 493, 473 S.E.2d 910, 914, n. 4 (1996).

The Book Exchange's complaint meets each of these legal requirements. The complaint first begins with 41 separate and specific paragraphs which provide the factual bases for jurisdiction and the various causes of actions, in keeping with W. Va. R. Civ. P. 8(e) (requiring pleadings to be concise, direct, and consistent) and with W. Va. R. Civ. P. 10(b) (requiring separate numbered paragraphs limited to a single set of circumstances). The complaint next contains Count I, ¶¶ 42-83, which states numerous statutory violation claims against Barnes & Noble and WVU.

Count II of the complaint, involving tortious interference with business relations, begins at ¶ 84 by adopting the numerous statutory violations in Count I by reference,

which is permitted under W. Va. R. Civ. P. 10(c). The tortious interference with business relations claim against Barnes & Noble and WVU is further stated at ¶¶ 85-91. To establish a prima facie case of tortious interference, the plaintiff must show: (1) the existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that interference caused the harm sustained; and (4) damages. C.W. Development, Inc., v. Structures, Inc. of West Virginia, Syl. pt. 1, 185 W.Va. 462, 408 S.E.2d 41 (1991)(citing Syl. pt. 2, Torbett v. Wheeling Dollar Savings & Trust Co., 173 W.Va. 210, 314 S.E.2d 166 (1984)).

The complaint states the first element of tortious interference, being the existence of a contractual or business relationship or expectancy. ¶ 85 of the complaint specifically states that Barnes & Noble and WVU have interfered with the "past, present, and prospective business expectancies and relations with students attending WVU, who receive financial aid." ¶ 91 states that the appellees prevented the Book Exchange "from acquiring and continuing business relations with WVU financial aid students." ¶ 100 also states that these damages "will continue to incur." These allegations regarding the Book Exchange's future business relations are far from the "wishful thinking" cited by the circuit court. (R. at 302, 315).

Next, under Arrow Concrete, Lodge, and Conrad, it is reasonable to infer that the Book Exchange's complaint states the existence of a contractual or business relationship or expectancy involving the sale of textbooks specifically to WVU financial aid students. ¶¶ 1 and 2 of the complaint allege the Book Exchange has been selling

textbooks and other items in Morgantown since 1934. ¶¶ 11-32 of the complaint clearly establish that the complaint is regarding WVU financial aid students, textbook sales, and the withholding of the student financial aid monies for use only at Barnes & Noble on campus stores. The complaint, at ¶ 44, refers to an unlawful diversion of trade, because financial aid students are being prevented from making purchases of lower cost textbooks at the Book Exchange.[3] ¶ 49 of the complaint names the Book Exchange as the main competitor of Barnes & Noble and WVU in Morgantown. ¶ 52 of the complaint refers to the competitive advantage Barnes & Noble and WVU have unlawfully obtained with public monies. ¶ 55 states that the appellees' interface program places financial aid student trade with Barnes & Noble and WVU "which would have otherwise gone to the Book Exchange." ¶ 65 of the complaint describes how the financial aid student is confused and misled by the electronic correspondence, which leads the student to believe that he or she is required to purchase textbooks at the Barnes & Noble stores, as opposed to the Book Exchange.

The complaint is clear on its face that the parties sell textbooks to WVU students, specifically financial aid students. The complaint alleges that the appellees' program unlawfully diverts trade and that the prospective or future business relations that the Book Exchange has with financial aid students is directly affected. Complaint, ¶ ¶ 27, 85, 89, 91, 100. Interference with future business sales may serve as the basis for the element of business expectancy. Buffalo Wings Factory, Inc. v. Mohd, ___ F. Supp.2d

[3]Many of the complaint's individual paragraphs establish more than one element of the tortious interference claim. For example, ¶ 44 also generally establishes the second element, an intentional act.

___, (E.D. Va., Dec. 12, 2007) 2007 WL 4358337(denying a Rule 12(b)(6) motion to dismiss a tortious interference claim involving, in part, confusing information being given to potential future restaurant customers). "[T]he Court finds that Plaintiff has sufficiently pled facts alleging that at least some portion of Plaintiff's loyal and repeat customer base has been lured away by Defendant's conduct." Id. "That there is no binding contract between employer and employé, or between the trader and his usual customers, makes no difference. Presumably, the customers would have continued their voluntary patronage but for the wrongful intervention and influence." W. Va. Transp. Co. v. Standard Oil Co., 50 W.Va. 611, ___, 40 S.E. 591, 596-97 (1901).

Since the Book Exchange has been in business since 1934, which is approximately 73 years, it is reasonable to infer that the Book Exchange would continue to sell textbooks to students in the future. The complaint, at ¶¶ 40 and 41, also makes reference to the large increase in student enrollment at WVU between 2000 and 2006, which went from 22,000 to approximately 27,000. Given this trend, it is also reasonable to infer that students will continue to buy books from the Book Exchange in the future. Such future purchases are unquestionably prospective business relations. To the extent that appellees' default program unlawfully diverts this future trade, as asserted, the first element of the tortious interference claim is stated.

The Book Exchange stated the second element of tortious interference, being an intentional act of interference by a party outside the relationship or expectancy, by describing in detail, the contract and lease agreement between Barnes & Noble and WVU. ¶¶ 7-13, 15, 17, and 33-38 of the complaint. ¶ 85 of the complaint specifically

states that Barnes & Noble and WVU "have intentionally and improperly interfered" with the Book Exchange's "past, present, and prospective business expectancies and relations with students attending WVU, who received financial aid."[4] Also, it is reasonable to infer that this contract was an intentional act by appellees. Contracts, statements, writings, and even public statements may serve as the basis for the intentional element of a tortious interference claim. Herman Strauss, Inc. v. Esmark Inc., ___ F. Supp.2d ___, (N.D. W.Va., Feb. 4, 2008), 2008 WL 313857(denying a Rule 12(b)(6) motion to dismiss plaintiff's tortious interference claim)(citing Garrison v. Herbert J. Thomas Mem. Hosp. Ass'n, 438 S.E.2d 6, 14 (1993) and Restatement (Second) of Torts § 766 cmt. k). Barnes & Noble and WVU are obviously outside the business relationship the Book Exchange has with financial aid students who have purchased or will purchase textbooks from the Book Exchange.

The Book Exchange stated the third and fourth elements of tortious interference, being proof that interference caused the harm sustained and damages, by describing at ¶ 89 of the complaint that appellees are liable for the "pecuniary and consequential harm resulting from the loss of benefits of business relations with WVU financial aid students" and at ¶ 90 by stating that the appellees have "unlawfully induced or otherwise caused WVU financial aid students to make purchases at Defendants' bookstores, as opposed to those students having the right to use their own money in order to purchase textbooks and other items" from the Book Exchange. Under the heading of "Damages," ¶¶ 96-102 of the complaint further set forth the damages claim,

[4]Although the complaint details the intentional acts of the appellees, W. Va. R. Civ. P. 9(b) states that intent "may be averred generally."

including the $2 million dollar figure. The Book Exchange's losses began when the financial aid interface program was started by appellees. ¶ 100 specifically established causation by stating the losses were "all occurring since and related to the inception and implementation" of appellees' interface program.

Additionally, ¶¶ 106 and 107 of the complaint, involving the application for preliminary injunction, describe the Book Exchange's increase in textbook sales for the 2007 summer term during which time the appellees voluntarily suspended the interface program. This establishes that the utilization of the financial aid interface by Barnes & Noble, under its contract with WVU, has caused damages to the Book Exchange, and one version of proof is this 2007 summer spike in textbook sales received by the Book Exchange, when appellees temporarily suspended their program. ¶ 109 states that the damages will continue to increase with every academic term the program exists.

The complaint sets forth more than a sufficient amount of information to put appellees on notice regarding the tortious interference claim, per Arrow Concrete and Lodge, and each inference must be drawn in favor of the Book Exchange, per Conrad. The Fass requirement that a "complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist" has been met by the Book Exchange. 177 W.Va. at 52, 350 S.E.2d at 564.

Additionally, a circuit court should not dismiss a complaint "merely because it doubts that the plaintiff will prevail in the action." Holbrook v. Holbrook, 196 W. Va. 725, 474 S.E.2d 905 (1996)(citing Lodge, 161 W. Va. at 605, 245 S.E.2d at 159). "The policy of the rule is . . . to decide cases upon their merits, and if the complaint states a

claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied." Lodge, 161 W. Va. at 605, 245 S.E.2d at 158-59 (citation omitted). Due to the liberal policy rule regarding construction of a complaint and rules favoring actions being determined on the merits, "the motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted." Mandolidis, et al. v. Eastern Associated Coal Corp., 161 W. Va. 695, 718, 246 S.E.2d 907, 921 (1978) (superseded by statute on other grounds).

"[T]he motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. The standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff's burden in resisting a motion to dismiss is a relatively light one." Lodge, 161 W. Va. at 606, 245 S.E.2d at 159 (citing Williams v. Wheeling Steel Corp., 266 F. Supp. 651 (N.D. W.Va. 1962)). *See also* Ross Brothers Const. Co. v. Sparkman, ___ F. Supp.2d ___, (S.D. W. Va., May 25, 2006) 2006 WL 1519362 ("Resolving all law and facts in Plaintiffs favor, Defendants have not reached the high burden of proving that there is no possibility that Plaintiffs may recover" for tortious interference against defendant). Under each of the legal standards, the circuit court below has erred in dismissing the Book Exchange's complaint.

In Torbett, the West Virginia Supreme Court held that defendants in tortious interference with business relationship actions "are not liable for interference . . . if they show. . . other factors that show the interference was proper." 173 W.Va. at 210, 314 S.E.2d 166 (1984). The Book Exchange's complaint asserts that Barnes & Noble and

WVU violated statutes, which are specifically set forth in count I. These assertions serve as part of the basis for the allegations that appellees have engaged in improper and unlawful activities.

The Torbett case quotes § 768 of the Restatement (Second) of Torts, "Competition as Proper or Improper Interference," as follows:

> (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employee wrongful means and (c) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other.

Torbett, 173 W.Va. 216, 314 S.E.2d 172, n. 13 (1984). Clearly, part (b) of the Restatement sets forth that competition is improper if the actor employs "wrongful means." While the parties may be in "competition" with one another, this competition is not "legitimate" where the appellees have employed "wrongful means."

"If a plaintiff makes a prima facie case, a defendant may prove justification or privilege, affirmative defenses. Defendants are not liable . . . if they show defenses of legitimate competition between plaintiff and themselves." Torbett, Syl. pt. 2 and C.W. Development, Syl pt. 1. The allegations in the Book Exchange's complaint establish the claim that appellees' interface and automatic withholding program does not constitute "legitimate competition." The institution of the unlawful interface and automatic withholding program by appellees prevents the parties from engaging in "legitimate competition."

Conduct specifically in violation of statutory provision or contrary to

> established public policy may for that reason make an interference improper. This may be true, for example, of conduct that is in violation of antitrust provisions or is in restraint of trade or of conduct that is in violation of statutes, regulations, or judicial or administrative holdings regarding labor relations.

Restatement (Second) of Torts § 767 cmt. c, "Unlawful conduct." The improper conduct and wrongful means in which appellees have engaged include the violations of statute set forth in count I of the Book Exchange's complaint.[5]

By way of further example, in Lucas v. Monroe County, 203 F.3d 964 (6th Cir. 2000), the plaintiffs were wrecker service operators who were removed from a county and sheriff call list. These operators had expectancies of business relationships for the towing of future customers, and tortious interference was claimed against the defendant. Though the facts in Lucas are not identical to the case at hand, a comparison can be made. In Lucas, when the names of tow truck companies were removed from the defendant's call list, the plaintiffs suffered economic damages by being prevented from entering into business with future stranded motorists who may obtain towing service through the list. Id. at 978. The U.S. Court of Appeals concluded that the plaintiffs had adduced sufficient evidence from which a rational trier of fact could find that the defendants are liable for tortious interference with the plaintiffs' economic

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[5]For example, it is the public policy of the State of West Virginia that institutions of higher education "minimize the costs to students of purchasing textbooks." W. Va. Code § 18B-10-14(c). The complaint alleges that the financial aid interface program removes a student's freedom of choice when the monies are involuntarily withheld, which results in the student being required to purchase textbooks from the appellees. Complaint ¶¶ 18-20, 22, 24, 25-28, 31-32, 44-45, 50, 57, 65, 70, and 90. Such action by appellees violates the requirement to "minimize the costs," because the student cannot comparison shop and purchase textbooks at a lower price elsewhere. Each of the statutory claims in the complaint are statements of West Virginia public policy, and each policy is violated by appellees.

relations. Id. at 979. In the present case, Barnes & Noble and WVU, through the institution of their interface program, have prevented the Book Exchange from entering into past and prospective business with WVU financial aid students.

Further, the Torbett and the Lucas decisions cite § 766B of the Restatement (Second) of Torts wherein it is stated that liability exists for tortious interference with prospective relations "whether the interference consists of (a) inducing or otherwise causing a third person not to enter or continue the prospective relation, or (b) preventing the [plaintiff] from acquiring or continuing the prospective relation." Torbett, 173 W. Va. at 215, 314 S.E.2d at 171; Lucas, 203 F.3d at 979. The appellees, through the institution of the interface and automatic withholding program, have intentionally prevented the Book Exchange from acquiring or continuing its prospective relations with WVU students who receive financial aid.

Next, there are multiple means by which wrongful or improper interference may be established. "One of the factors listed in the Restatement (Second) of Torts, § 767 is 'the nature of the actor's conduct.' The established standard of a trade or profession provides a means of evaluating a particular 'actor's conduct.'" C.W. Development, 185 W. Va. at 465, 408 S.E.2d at 44. Further, "liability might arise 'by reason of . . . perhaps an established standard of trade or profession.'" Id. (citing Top Service Body Shop v. Allstate Ins. Co., 283 Or. 201, 582 P.2d 1365, 1371 (1978)). The Oregon Court also noted that the interference "may be wrongful by reason of a statute or other regulation, or a recognized rule of common law." 283 Or. at 210-11, 582 P.2d at 1371. Additionally, "unethical conduct is an improper method of interference." C.W. Development, 185 W.

Va. at 465, 408 S.E.2d at 44 (citing Trepel v. Pontiac Osteopathic Hosp., 135 Mich.App. 361, 354 N.W.2d 341 (1984)). "[S]harp dealing or overreaching can interfere with a business expectancy." Id. at 185 W.Va. 466, 408 S.E.2d 45 (citing Kinco, Inc. v. Schueck Steel, Inc., 283 Ark. 72, 671 S.W.2d 178 (1984)). The complaint at ¶ 87, states that appellees' actions "are improper, because the actions are unethical, are overreaching, and are below the behavior of fair corporations similarly situated."

There is also no requirement that the Book Exchange have an independent cause of action for those violations of statute which serve as an element of the tortious interference claim.

> [I]n a claim of improper interference with plaintiff's contractual relations, it is not necessary to prove all the elements of liability for another tort if those elements that pertain to the defendant's conduct are present. For instance, fraudulent misrepresentations made to a third party are improper means of interference with plaintiff's contractual relations whether or not the third party can show reliance injurious to himself.

Top Service Body Shop, 283 Or. at 210, 582 P.2d at 1371, n. 11 (citing Estes, Expanding Horizons in the Law of Torts Tortious Interference, 23 Drake L.Rev. 341, 348 (1978)). "The variety of means by which the actor may cause the harm are stated in § 766, Comments *k* to *n*. Some of them, like fraud and physical violence, are tortious to the person immediately affected by them; others, like persuasion and offers of benefits, are not tortious to him." Restatement (Second) of Torts § 767 cmt. c. *See also* Garrison v. Herbert J. Thomas Mem. Hosp. Ass'n which states that "[t]he 'intentional act of interference' could consist of defamatory statements or writings. Yet, merely because one of the elements of tortious interference could require proof of defamatory statements or writings does not change the cause of action to defamation." 190 W.Va. at

222, 438 S.E.2d at 14.

By way of further example, in Kessel v. Leavitt, 204 W. Va. 95, 511 S.E.2d 720 (1998), the Supreme Court recognized a cause of action for tortious interference with parent-child relationships. Id., 204 W.Va. at 140, and 511 S.E.2d at 765. This Court's holding was based in part on the fact that the criminal statutes of the State of West Virginia provided for "penal remedies for unlawful custodial interference." Id. Although Mr. Kessel had no civil standing under the criminal code, he was permitted to proceed under the tortious interference theory of civil liability. Similarly, the Book Exchange should be permitted to assert claims of statutory violations (upon which it may not have independent standing) as part of its tortious interference claim.

As early as August 24, 2007, the Book Exchange admitted that although it did not have an independent cause of action for W. Va. Code §§ 18B-10-14, 46A-6G-2, 46A-6 et. seq., and 46-1-304, these statutory violations nonetheless could be asserted under plaintiff's tortious interference claim, per C.W. Development, Inc., v. Structures, Inc. of West Virginia. (R. at 192, 194, and 231; Tr., August 28, 2007, 57-58, 67, R. at Vol. IV).[6]

Given the numerous means by which a plaintiff may establish unlawful or wrongful conduct in a tortious interference claim, the Book Exchange has stated a claim upon which relief can be granted, and dismissal of the complaint was in error. With respect to the statutory violations and civil conspiracy claims, each of the elements are concisely and directly stated in the complaint, with supporting factual assertions. Complaint ¶¶ 1-83 and 92-110. In view of the body of law governing Rule 12(b)(6),

[6] The circuit court's December 7, 2007, order, states in a footnote that appellant's stipulation occurred one day prior to the October 4, 2007, opinion letter. (R. at 311-12, n. 2).

expressed herein, the court also erred in dismissing the statutory and conspiracy claims.

(2) The Book Exchange's complaint should not have been dismissed with prejudice.

"Because pleadings under our *Rules of Civil Procedure* are designed to give notice and do not necessarily formulate the trial's issues, the pleadings generally contain insufficient data to provide a sufficient basis for a judgment upon the merits." Sesco v. Norfolk and Western Railway Co., 189 W.Va. 24, 26, 427 S.E.2d 458, 460 (1993).

The circuit court's October 3, 2007, opinion letter does not state whether the dismissal of the complaint is with or without prejudice. The final Order Granting Defendants' Motions to Dismiss, dated December 7, 2007, does state the dismissal is with prejudice. "[A] judgment sustaining a motion to dismiss under Rule 12(b) R.C.P. is not a dismissal with prejudice." Syl. pt. 3, Rhododendron Furniture & Design, Inc. v. Marshall, 214 W. Va. 463, 466, 590 S.E.2d 656, 659 (2003)(involving a circuit court's conversion of a Rule 12(b)(6) motion into a Rule 56 motion for summary judgment, by examining documents outside the pleadings)(citing Syl. pt. 4, U.S.F.&G. v. Eades, 150 W. Va. 238, 144 S.E.2d 703 (1965)). The West Virginia Supreme Court of Appeals did render a decision in 1975, which stated that the dismissal of an action under Rule 12(b)(6) "without reservation of any issue, shall be Presumed to be on the merits, Unless the contrary appears in the order, and the judgment shall have the same effect of Res judicata as though rendered after trial in a subsequent action on the same claim." Sprouse v. Clay Communication, Inc., 158 W.Va. 427, 461, 211 S.E.2d 674, 696 (1975)(citing 1B Moore's Federal Practice (2nd Ed. 1974), § 0.409)).

The Sprouse opinion specifically referenced the U.S.F.&G. opinion. Id., 158

W.Va. at 457, 211 S.E.2d at 694. Although the 1975 Sprouse decision overruled the 1965 U.S.F.&G. opinion (with respect to the prejudice issue), the 2003 Rhododendron case specifically cites the U.S.F.&G. opinion in Syllabus Point 3. Rhododendron is a per curiam opinion, and appellant discloses that Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290 (2001), is arguably adverse to its position. "This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution." Id., Syl. pt. 2. However, "[p]er curiam opinions have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions." Id., Syl. pt. 3.

The Supreme Court also stated in Rhododendron that "whether the circuit court dismisses a party's case under Rule 12 or Rule 56 determines if the nonmoving party will have the opportunity to re-file, amend their complaint, or conduct additional discovery." 214 W. Va. at 466, 590 S.E.2d at 659. Inasmuch as the Book Exchange was not able to present evidence to the circuit court at the 12(b)(6) hearing, the circuit court's ruling should have been without prejudice so as to give the Book Exchange the appropriate opportunity to re-file the complaint in circuit court. The Book Exchange alternatively moved the circuit court to permit discovery and alternatively moved to permit the Book Exchange to amend its complaint, in order to address any pleading issues that the circuit court may have had. (R. at 221). As discussed later in this appeal, these motions were denied in the final order. (R. at 317, n.3).

Rule 41(b) of the West Virginia Rules of Civil Procedure permits a court to enter any dismissal without prejudice, because it gives the circuit court the ability in its order

to state that the dismissal is "otherwise," meaning that the dismissal should not operate as an "adjudication upon the merits." Rule 41(b) provides that a dismissal for lack of jurisdiction does not operate "as an adjudication upon the merits." The Book Exchange also contends that the final order of December 7, 2007, should have been without prejudice, because the opinion letter and final order dismisses the complaint for lack of standing in large part. The opinion letter, at ¶ 2, and the final order at page 7, states that the Book Exchange concedes that "it might not have standing" on various statutory claims, and in turn the circuit court believes that this lack of standing in some manner precludes the Book Exchange from making the same statutory violation claims as part of its tortious interference claim. (R. at 302, 314). As cited above, the Book Exchange maintains that even though it may not have a direct independent cause of action for some of its statutory claims, these statutory violations may nevertheless serve as elements under the tortious interference claim.

The Book Exchange contends that the circuit court's dismissal is more consonant with a dismissal for lack of jurisdiction as opposed to a dismissal for failure to state a claim upon which relief can be granted. A dismissal for lack of jurisdiction of the subject matter is found under Rule 12(b)(1). A lack of standing could equate to a lack of jurisdiction over the subject matter. "[I]t is likely that a dismissal in the instant case for a lack of standing would constitute a dismissal for lack of jurisdiction within the meaning of Rule 41." Belcher v. Greer, 181 W. Va. 196, 382 S.E.2d 33, n. 2 (1989) (citing Costello v. United States, 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961)). "Since a dismissal with prejudice is a harsh sanction, such a dismissal is warranted only in

extreme circumstances." Belcher, 181 W. Va. at 198, 382 S.E.2d at 35 (citing 5 Moore's Federal Practice at 41-201-203 (2nd Ed.)). Under Rule 41(b), such a dismissal for lack of standing would be without prejudice. The circuit court erred when it dismissed the complaint with prejudice.

(3) The circuit court erred when it improperly considered "evidence and proffers" under Rule 12(b)(6); applied a W. Va. R. Civ. P. 56 summary judgment legal standard; and dismissed the complaint without permitting discovery.

The circuit court improperly treated the Rule 12(b)(6) hearing as a motion for summary judgment proceeding per W. Va. R. Civ. P. 56. The circuit court's October 3, 2007, opinion letter, at page 1, in the first sentence, states that the court reviewed "the pleadings, evidence and proffers offered at the hearing on August 28, 2007." The opinion letter was supposed to be attached to the December 7, 2007, final order of dismissal. (R. at 309, n. 1). Also, the Book Exchange was not permitted to complete discovery and to present evidence to the circuit court.

The opinion letter and the final order contain several factual findings which further indicate that "evidence" was considered, as opposed to a true Rule 12(b)(6) ruling which should have been based upon the pleadings in the complaint alone. "Only matters considered in the pleading can be considered on a motion to dismiss under Rule 12(b) R.C.P." Dunn v. Consolidation Coal Co., 180 W.Va. 681, 683, 379 S.E.2d 485, 487 (1989)(citation omitted). The Dunn case goes on to cite that if a 12(b)(6) proceeding is disposed of per Rule 56 summary judgment, then "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion." Id. (citing Syl. pt. 3, Toler v. Shelton, 159 W.Va. 476, 223 S.E.2d 429 (1976)).

In its written objections to the proposed dismissal order, the Book Exchange brought a motion in the alternative to permit discovery, so that the Book Exchange could properly prepare for a Rule 56 hearing. The motion for discovery was denied in the final order of the circuit court. (R. at 317, n. 3). "[I]n antitrust cases, where 'the proof is largely in the hands of the alleged conspirator,' . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Arrow Concrete, 194 W.Va. at 244, 460 S.E.2d at 59 (citing Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S.Ct. 1848, 1853, 48 L.Ed. 338, 345 (1976)(citation omitted)).

At ¶ 2 of the opinion letter, in the last sentence, the court states it "cannot make a finding that the reserve program harms financial aid students at WVU." At ¶ 3, the court states that it "does not find that the [program] is tantamount to 'preventing' or 'unlawfully interfering' with the prospective business relationships between The Book Exchange and the students." The circuit court goes on to state that it "does not find a sufficient basis for the Book Exchange's claim for tortious interference with business relationships." The final order also states at page 8 that the court does not find a "sufficient basis" for the tortious interference claim. The court then states in the opinion letter and the final order that the parties "are in legal competition with one another." These are factual findings which do not go to the issue of whether the Book Exchange states a claim upon which relief can be granted.

The circuit court cited the Southprint, Inc. v. H3 Inc., 2008 Fed. Appx. 249 (4th Cir. 2006)(unpub.), case in its opinion letter and final order for the purpose that "the

Plaintiff must establish 'a probability of future economic benefit, not just possibility.'" In the Southprint case, the plaintiff appealed the U. S. District Court's grant of a motion for summary judgment of plaintiff's state-law causes of action for tortious interference. The holding from that case is that the plaintiff "must establish a probability of future economic benefit, not a mere possibility." This holding relates to whether the plaintiff met its burden under Rule 56. The circuit court in the present case held the Book Exchange to the Southprint Rule 56 standard, not a 12(b)(6) standard.

In the opinion letter and the final order, the circuit court also cited the Lucas v. Monroe County, 203 F.3d 964 (6th Cir. 2000) case to show that the Book Exchange failed to prove an "anticipated business relationship with an identifiable class of third parties." Just as with Southprint, the Lucas opinion dealt with a Rule 56 ruling, not a Rule 12(b)(6) dismissal. The distinction is between what the Plaintiff must prove under Rule 56 and what the Plaintiff must state under Rule 12(b)(6). Rule 12(b)(6) "is not a procedure for resolving a contest about the facts or the merits of the case." Sarkissian v. West Virginia University Bd. of Governors, ___ F. Supp.2d ___ (N.D. W.Va., May 3, 2007) 2007 WL 1308978 (citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1356, at 294 (2d ed. 1990)). "The Rule 12(b)(6) motion also must be distinguished from a motion for summary judgment under Federal Rule of Civil Procedure 56, which goes to the merits of the claim and is designed to test whether there is a genuine issue of material fact." Id. Sarkissian and Wright and Miller at 298.

At ¶ 4 of the opinion letter, the circuit court states that the "Book Exchange has failed to convince the Court that either the means or the end result of the [Barnes &

Noble and WVU] financial reserve program is unlawful." Page 9 of the final order states that "neither the ends nor the means of the Defendants' activities are unlawful or tortious." The Book Exchange asserts that this is a standard of proof which does not apply in Rule 12(b)(6) proceedings. In order to state a claim upon which relief can be granted, "all that the pleader is required to do is to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist." Arrow Concrete, n. 6 and Lodge, 161 W.Va. at 605-606, 245 S.E.2d at 159.

A fair review of the October 3, 2007, opinion letter, and the December 7, 2007, final order, leads one to the conclusion that the circuit court erred when it considered evidence and made a ruling of a Rule 56 variety as opposed to Rule 12(b)(6) and when it denied the motion to permit discovery to take place. *See also* Felman Production, Inc. v. Bannai, ___ F.Supp.2d ___, (S.D. W.Va., Nov. 1, 2007) 2007 WL 3244638 (denying a Rule 12(b)(6) motion in a tortious interference case where defendants alleged plaintiff did not state the potential business relationships).

(4) The circuit court improperly dismissed the complaint without permitting the Book Exchange to amend its complaint.

In its written objections to the proposed dismissal order, the Book Exchange brought a motion in the alternative to amend the complaint, in order to address any pleading issues the circuit court may have had. This motion was denied in the court's final order dismissing the action. (R. at 317, n. 3). "Ordinarily, in the case of a challenge to a complaint under Rule 12(b)(6), if the court determines that there is an insufficiency in a complaint, a party is afforded the opportunity to amend the complaint before dismissal of a case, which opportunity should be liberally given." Hinchman v. Gillette,

217 W.Va. 378, 385, 618 S.E.2d 387, 395 (2005)(citing Syl. pt. 6, Cotton States Mut. Ins. Co. v. Bibbie, 147 W.Va. 786, 131 S.E.2d 745 (1963) and Farmer v. L.D.I., Inc., 169 W.Va. 305, 286 S.E.2d 924 (1982)). *See also* W. Va. R. Civ. P. 15(a)(providing that "leave shall be freely given when justice so requires" upon a motion to amend a complaint).

The circuit court's final order, at page 8, contains a finding that "the Complaint does not set forth a sufficient basis for the Book Exchange's claim for tortious interference with business relationships." Also on page 8, the order states that the Book Exchange did not allege "facts sufficient" to establish an element of the tortious interference claim. The court's opinion letter, at page 2, states that the court "does not find a sufficient basis for the Book Exchange's claim for tortious interference." The Book Exchange contends that if the circuit court was of the opinion that the complaint was insufficient as stated, then leave to amend should have been granted. Additionally, had the court permitted discovery to proceed, the Book Exchange would have had the appropriate opportunity to develop the "sufficient basis" of its claim and the "facts sufficient" referenced by the court.

The West Virginia Supreme Court of Appeals has permitted a party to amend a complaint on appeal, where no such motion was brought by the plaintiff and where no tortious interference claim was even made below. In the Torbett case, the procedural history consisted of the plaintiff bringing a declaratory judgment action regarding a covenant not to compete clause in her employment contract with a bank. The case was remanded by the Supreme Court so that Ms. Torbett could amend her action so as to allege tortious interference with prospective employment or business relations. Torbett,

173 W. Va. at 215, 314 S.E.2d at 171. The circuit court in the present case erred when it denied the Book Exchange's motion to amend.

(5) The circuit court erred when it dissolved the preliminary injunction granted July 25, 2007.[7]

On July 20, 2007, a hearing was held on the Book Exchange's application for injunction, which was made as part of the complaint. Complaint, ¶¶ 103-110. The case below was assigned to the Honorable Judge Robert B. Stone, Division I, but the Honorable Judge Russell M. Clawges, Jr., Division II, presided over the injunction hearing. Tr., July 20, 2007, R. at Vol. III. Judge Stone's presence was required in Kanawha County to preside over a criminal trial for which venue had been changed. Judge Clawges granted the Book Exchange's request to enjoin WVU and Barnes & Noble use of the automatic financial aid withholding program, on a temporary basis, only for the Fall 2007 WVU academic semester. Judge Clawges advised counsel for the Book Exchange that any requests for further injunctive relief, such as for the Spring 2008 academic semester, must be taken before Judge Stone in November or December 2007. (R. at 122, 125). Judge Clawges entered this order (which was prepared by counsel for the Book Exchange), prior to objections being submitted by appellees, so as to immediately require the Book Exchange to post the required $600,000.00 bond. Barnes & Noble has since forwarded written objections regarding this Order to Judge Clawges.

[7]As a result of the circuit court's October 4, 2007, opinion letter, and due to the lack of a final order, the preliminary injunction became the subject of appellant's December 3, 2007, interlocutory petition seeking expedited relief before the Supreme Court of Appeals. (R. at 255). The circuit court entered its dismissal order on December 7, 2007. The Supreme Court of Appeals, in vacation, refused the appellant's interlocutory petition regarding the injunction, on December 18, 2007, in Case No. 073592.

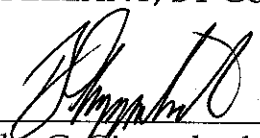
Inasmuch as the injunction order was temporary in nature and affected only the Fall 2007 semester, the circuit court below erred in dissolving the injunction by virtue of its final order of December 7, 2007. The purpose of the request for the injunction was to enjoin the appellees from utilizing the automatic financial aid withholding for purchases of textbooks. The effect of the injunction on the appellees was received at the beginning of the semester in August 2007, when textbooks naturally are purchased by financial aid students. The preliminary injunction had in essence run its course, and there was no need by the circuit court to dissolve an injunction, which in December 2007, had no practical effect.

W. Va. R. Civ. P. 65(c) provides that the purpose of security or bond on a preliminary injunction is "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." The Book Exchange asserts the present error, so that this issue is properly preserved on appeal. The Book Exchange contends that the appellees were not "wrongfully enjoined or restrained." To the extent that the circuit's court final order of December 7, 2007, could be considered as finally determinative of the issue of wrongful enjoinment or restraint, that issue is raised on appeal herein. The Book Exchange asserts that this precise issue has not been determined below, but the matter is raised on appeal out of an abundance of caution. The Book Exchange contends that the appellees have not "prevail[ed] in obtaining dissolution of the injunction." Quintain v. Columbia Natural Resources, Inc., 210 W.Va. 128, 137, 556 S.E.2d 95, 104 (2001).

PRAYER FOR RELIEF

For the foregoing reasons, Appellant, the Book Exchange, Inc., respectfully requests that the West Virginia Supreme Court of Appeals grant this appeal, reverse the circuit court below, and remand the matter with instructions consistent with this appeal.

RESPECTFULLY SUBMITTED,
THE BOOK EXCHANGE, INC.
APPELLANT, BY COUNSEL.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 34162

THE BOOK EXCHANGE, INC.

v. Civil Action No.: 07-C-369
Monongalia County

WEST VIRGINIA UNIVERSITY, et al.
and
BARNES AND NOBLE COLLEGE BOOKSELLERS, INC.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true copy of the within **APPELLANT'S BRIEF**, via U. S. Mail, on the 17th day of July, 2008, upon the following named counsel:

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